> originating and terminating in a specific geographic area, such as a MSA? For example, should [the Commission] limit access to unbundled transport in geographic areas where sufficient levels of alternative transport facilities exist? Should [the Commission] limit the availability of transport to certain capacity levels?"[90]

Although some of these factors may be appropriate for consideration by the Commission as part of the impair analysis, their appropriateness for consideration will be determined by how and why the Commission considers them during the impair analysis. In short, the purpose for which the Commission considers a particular factor as part of the impair analysis in many cases is just as important as the factor itself.

Section 251(d)(2) directs the Commission, in determining which network elements the ILECs must make available on an unbundled basis pursuant to Section 251(c)(3), to "consider, *at a minimum*, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[91] Congress provided the Commission with discretion in performing the impair analysis under Section 251(d)(2) to consider "additional factors" that are consistent with the Act and the assumptions upon which it is based.

The language of Section 251(d)(2) requires the Commission to apply the impair standard from the perspective of the requesting carrier, not the ILEC or end users. This requirement has a direct impact on the factors the Commission can consider in applying the impair standard, as well as the way in which the Commission can consider them. Specifically, the Commission can only consider factors that potentially affect the requesting carrier's ability to enter the market and "provide the services that it seeks to offer." Once the Commission

[90] *Notice*, 16 FCC Rcd at 22810, ¶ 64.

[91] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

identifies a factor that potentially may affect a requesting carrier's ability to enter the market and provide services, it must interpret the record data with respect to that factor from the perspective of the requesting carrier to determine what the data demonstrate, if anything, about the ability of the requesting carrier to enter the market and provide the desired services. Factors that do not affect the requesting carrier's ability to enter the market and provide services cannot be considered by the Commission in applying the impair standard.

CompTel fully supports the Commission's efforts to perform a more thorough impair analysis. CompTel has strong concerns about the Commission's proposed "granular" application of the impair standard. In particular, the Commission could violate the letter and the spirit of the 1996 Act if its pursuit of "granularity" leads it astray from the perspective of the requesting carrier. Requesting carriers do not enter markets and provide services in a "granular" way. It is not surprising, therefore, that business plans are not "granular," and thus decisions to enter the telecommunications marketplace are not generally consistent with the granularity approach discussed in the *Notice*.

If the Commission focuses on only one piece of a business plan, there is a danger that it will miss the extent to which all the pieces of the business plan depend upon each other, and indeed how the removal of a UNE in a single marketplace can affect a requesting carrier's viability as a whole (*e.g.*, by triggering financing covenants based on gross margins). In short, granular application of the impair standard does not reflect the decision-making process for market entry or the provision of services in an ILEC-dominated market. For the same reasons, granular application of the impair standard could lead to the premature removal of a UNE without considering the ripple effect that such removal might have on the entire telecommunications marketplace.

Granular application of the impair standard also is impractical from an administrative standpoint. Specifically, any application of the impair standard on a central office by central office basis is a war of attrition in which new entrants and consumers will be the ultimate casualties. The implementation of such a procedure would surely cause the costs of entry to skyrocket, while carriers would be delayed in entering the local market. To avoid such an impediment to competition, CompTel recommends that the Commission continue with its pre-existing approach of adopting a uniform, national list of UNEs that will be available everywhere.

A. The Service-By-Service Application of the Impair Standard is Contrary to the Statute.

In the *Notice*, the Commission seeks comment on "whether [S]ection 251(d)(2) requires us to take into account the particular 'service' the requesting carrier seeks to offer," or whether "[S]ection 251(c)(3) suggest[s] the opposite, and limit[s] in part or in whole our ability to define 'network elements' in terms of 'services.'"[92] The Commission also asks whether it is useful to conduct the unbundling analysis for individual services or whether such an analysis would stifle innovation and creativity as carriers decline to expand the service they offer for fear of losing access to UNEs.[93]

The statute requires the FCC to apply the impair standard on a functionality-by-functionality basis, and prohibits the FCC from applying the impair standard on a service-by-service basis. Section 251(d)(2) expressly requires the FCC to "determin[e] what network elements should be made available for purposes of subsection (c)(3)."[94] The statute already

92 *Notice*, 16 FCC Rcd at 22799, ¶ 37.

93 *Id.*

94 47 U.S.C. §251(d)(2).

defines the term "network element" in 47 U.S.C. §153(29), and the regulatory regime governing UNEs is already fully established in Sections 251(c)(3) and 252(d)(1). It bears emphasis that Congress prohibited the FCC from removing or mitigating the ILECs' unbundling obligations in 47 U.S.C. §160. The FCC's task is strictly limited to identifying the specific network elements – as that term is defined by Congress – to slot into the statutory regime for UNEs. The statement in Section 251(d)(2) that the FCC should identify UNEs "for purposes of subsection (c)(3)" confirms the FCC's limited role in conducting the impair inquiry.

As the statute states expressly, and as the FCC itself has recognized, network elements are "defined by facilities or their functionalities or capabilities, and thus, ***cannot be defined as specific services***."[95] Accordingly, when the statute directs the FCC to determine which UNEs must be made available by the ILECs, the FCC's duty is to identify those functionalities that the ILECs must make available to requesting carriers. The statute does not give the FCC the authority to modify the definition of a network element or alter the statutory regime for UNEs through its application of the impair standard in Section 251(d)(2).

The statutory scheme makes sense given the nature of UNEs as functionalities. The principal inquiry under the impair standard – to determine whether certain functionalities are available today from third parties in the marketplace or through self-supply – normally is not affected by the service the requesting carrier provides using the UNE. For example, one's ability to buy or lease a backhoe in the marketplace does not depend upon whether one constructs swimming pools or roads. If the backhoe is neither available from third-parties, nor able to be

95 *Local Competition Order*, 11 FCC Rcd at 15634, ¶ 264 (emphasis added).

provided by the competitor itself, the competitor will be impaired in its ability to provide service regardless of whether that service is the construction of swimming pools or roads.

The Supreme Court endorsed the FCC's historic application of the impair standard on a functionality-by-functionality basis. The Supreme Court held that the FCC's application of the "network element" definition was "eminently reasonable,"[96] and that "Section 251(d)(2) does not authorize the FCC to create isolated exemptions from the underlying duty to make all network elements available. It requires the FCC to determine on a rational basis *which* network elements must be made available."[97] This holding precludes the FCC's attempt to modify the statutory definition of "network element" by limiting UNEs based on the telecommunications services they are used to provide.

The statutory pricing standard in Section 252(d)(1) also militates against the service-by-service approach. When a competitive carrier buys a UNE, it pays for the entire functionality, including all "capabilities" of the UNE. 47 U.S.C. §153(29). By limiting the services for which a UNE may be used by the requesting carrier, the FCC would be modifying the UNE by effectively removing some of its capabilities. For example, the provision of exchange access service is a "capability" of most UNEs, and a rule that a requesting carrier may not obtain a UNE to provide exchange access service prevents the carrier from using that capability. The TELRIC rate is for the entire functionality, including all capabilities, and any service limitations devalue the UNE. Thus, there is a disconnect between pricing (a requesting carrier pays for the entire UNE) and the service-by-service approach (a requesting carrier can only use some capabilities offered by the UNE). Had Congress intended to authorize the FCC to

96 *Iowa Utils. Bd.*, 525 U.S. at 387.

97 *Id.* at 391.

impose usage restrictions on UNEs, it would have required discounts off TELRIC rates to reflect such limitations. The fact that Congress did not require or authorize such discounts, is further evidence that service restrictions on UNEs violate the statute.

The service-by-service approach shares the defect of the Commission's proposed "granular" approach to the impair standard in that it ignores the business requirements of providing services as a new local entrant. In particular, the service-by-service approach is based on the unrealistic assumption that a requesting carrier has a separate business plan and underlying network for each service that it desires to provide. As a hypothetical, suppose that a requesting carrier desires to offer three different services using a particular functionality. Suppose also that the Commission finds that carriers are impaired for only two of the services. The service-by-service approach would lead to the absurd result that the carrier can use the functionality only for two services, thereby forcing the carrier to incur the cost of purchasing a duplicate functionality in order to implement its business plan of providing three services. The reality is that the carrier's business plan does not work unless it can use a single functionality – whether obtained from the ILEC, another third party, or through self-provisioning – to provide all three services. Hence, a finding that the carrier is impaired for two services entails that the carrier must use the ILEC-supplied functionality for all three. Otherwise, the carrier is faced with the dilemma of eliminating one of its planned services or simply exiting the market because the Commission's rules have prevented it from using a single functionality efficiently to provide the desired menu of services.

The business reality is that a competitive carrier must be able to obtain a functionality once and use it with maximum efficiency, and if *any* of the services it desires to provide over the functionality satisfies the impair standard, then the carrier is legally entitled to obtain the functionality as a mandatory UNE for the provision of any and all services it desires to provide over the UNE.[98] It should be emphasized that Section 251(d)(2) requires the FCC to apply the impair standard with respect to the "services" that a requesting carrier desires to provide. The use of the plural term "services" rather than the singular term "service" confirms that a requesting carrier is entitled to use a UNE to provide all desired services if denial of access to the UNE would effectively prevent it from offering the complete package of services that it desires to offer.

The practical infeasibility of a service-by-service approach confirms the clear intent of Congress that the impair standard be applied on an functionality-by-functionality basis. Under a service-by-service approach, the FCC would need to undertake an impairment analysis for ***all*** network elements for ***every*** possible service that a requesting carrier might seek to offer. The FCC could not possibly complete such a massive undertaking.[99] Nor would it be feasible for the Commission and parties to police the service-by-service approach and monitor the services that new entrants use UNEs to provide. The FCC lacks both the data and the resources to effectively implement such an approach. Based on the axiom that statutory interpretations

98 The same analysis condemns any rule that would limit the use of a UNE based on customer types. For example, if the FCC adopts a rule that a UNE can be used only to serve residential customers, then any new entrant desiring to serve both residential and business users is effectively precluded from using the UNE to implement its business plan. The entrant would have to choose between modifying its business plan by foregoing one of its target markets (business customers) or incurring the additional cost of obtaining redundant functionalities to serve different sets of customers. Such an approach is inherently anti-competitive and does not reflect the type of UNE regime that Congress intended to create when it adopted the 1996 Act.

99 Notably, Congress directed the FCC to complete its initial application of the impair standard within six months of the date of enactment of the 1996 Act. 47 U.S.C. §251(d). It is inconceivable that Congress expected the FCC to complete a massive, service-by-service implementation of the impair standard within a six-month period.

leading to absurd results must be rejected, the service-by-service theory is neither reasonable nor a permissible interpretation of the statutory impair provisions.[100]

Of course, ultimately a service-by-service approach would be implemented not by the FCC, but by the ILECs as they stifled competitive entry with a series of unilateral and arbitrary decisions as to which entrants may obtain which UNEs to provide which services. While new entrants in theory would have the ability to raise disputes with the Commission or to invoke the FCC's enforcement procedures, the reality, as even the FCC must candidly admit, is that the FCC is not up to the task of implementing a service-by-service regime in the face of deliberate and widespread ILEC conduct to manipulate such a regime to destroy competition. There is no better example of this administrative impracticality than the regime established by the FCC to govern the enhanced extended link ("EEL") – a UNE combination comprised of the loop and dedicated transport UNEs – in CC Docket No. 96-98 beginning with the *UNE Remand Order* in 1999. The FCC promulgated a complex and arcane set of rules to restrict the availability of EELs,[101] and the ILECs ruthlessly pounced upon the multitude of ambiguities in the FCC's EELs regime to prevent entrants from obtaining EELs for the provision of any services whatsoever. The FCC's regulatory and enforcement procedures have been profoundly ineffective in responding to the disputes created by self-serving unilateral conduct by the

[100] *See Burns v. United States*, 501 U.S. 129, 137 (1991).

[101] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"). CompTel's appeal of that decision is pending before the U.S. Court of Appeals for the District of Columbia Circuit in *Competitive Telecommunications Association v. FCC*, No. 00-1272 (D.C. Cir.).

ILECs,[102] nor do requesting carriers have unlimited resources to litigate these disputes or to survive for years while the matters are waiting to be resolved.[103] A service-by-serve approach to UNEs generally inevitably would lead to exactly the same result as exists today for EELs, thereby effectively eliminating the utility of UNEs for new entry into telecommunications markets.

The service-by-service approach to the impair standard also must be rejected because it would stifle innovation and the development of new services. This approach shrink-wraps UNEs based on particular services that have been found to satisfy the impair standard. Should a new entrant make any change to those services, the ILECs almost certainly would unilaterally take away that carrier's UNEs by arguing that the carrier is providing a "new" service that has not been found to satisfy the impair standard. As a result, new entrants would be forced to provide plain vanilla services that exactly mirror the services the FCC has found to satisfy the impair standard. Such a result is contrary to the public interest in encouraging carriers to develop new and innovative service offerings for consumers.[104] This defect cannot be cured by requiring ILECs to seek a Commission ruling before taking steps against entrants who modify or expand their service offerings. The FCC tried a similar approach with respect to EELs, but

102 The FCC waited well over a year to issue a decision in the Net2000 complaint against Verizon, and it has sat on EELs waiver requests by WorldCom, Inc. and ITC^DeltaCom Communications, Inc. for lengthy periods of time. Indeed, the entire EELs rulemaking has been a series of missed deadlines by the FCC, with the result that the FCC still has not issued "final" rules to replace an "interim" rule that was first begun over two years ago in the *UNE Remand Order* in November, 1999.

103 For example, Net2000 went bankrupt while waiting to resolve numerous disputes with Verizon. *See Net2000 v. Verizon-Washington, D.C., Inc., Verizon-Virginia, Inc.*, 17 FCC Rcd 1150 (2002).

104 *See, e.g.*, 47 U.S.C. § 157 nt ("It shall be the policy of the United States to encourage the provision of new technologies and service to the public.").

the ILECs simply ignored the FCC's prohibition on conducting audits before providing EELs to new entrants.[105]

The Commission asks how it should consider the level of competition for a particular service.[106] The level of *competition* for a particular *service* is legally and empirically irrelevant to the impair inquiry for *unbundled network elements*. There may be competition despite the fact that a particular carrier is impaired without access to UNEs. In particular, some entities may be providing services based on tariffed ILEC services. The FCC has previously determined that the availability of certain functionalities through ILEC services cannot affect the impair inquiry,[107] and CompTel urges the Commission to continue to recognize and apply that holding.

The Commission asks what, if anything, it should "infer for purposes of the unbundling analysis from Congress' descriptions of these items as 'local' in the section 271 competitive checklist."[108] Those references are specific to Section 271, which was designed to ensure that the Bell Companies lose their *local* monopolies before being admitted into the in-region interLATA market. If anything, Congress' decision not to include the word "local" in Section 251 shows that it intended for UNEs to be more broadly available through Section 251 than as a checklist item for Section 271.

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105 Ex Parte letter dated December 22, 2000 from Jonathan Askin, ALTS, to Jodie Donovan-May, FCC, CC Docket No. 96-98, at page 2.

106 *Notice*, 16 FCC Rcd at 22799, ¶ 38.

107 *UNE Remand Order*, 15 FCC Rcd at 3732, ¶ 67.

108 *Notice*, 16 FCC Rcd at 22799, ¶ 38.

B. The 1996 Act Requires the Commission to Focus on Impairment from the Perspective of the Requesting Carrier, not the ILEC or the End Users.

The plain language of Section 251(d)(2) requires the Commission to apply the impair standard from the perspective of the requesting carrier, not the ILEC or the end users. Specifically, the Commission must determine whether "failure to provide access to such network elements would impair the ability ***of the telecommunications carrier seeking access*** to provide the services that it seeks to offer."[109] Notably, the statute does not focus on the effect of unbundling on the ILEC or the end user, which is not surprising given the assumption upon which Congress based the Act: mandatory unbundling of the ILEC's network will foster competition, and competition will benefit end users and the telecommunications industry as a whole in the long run.

The decision by Congress to require the Commission to perform the impair analysis solely from the perspective of the requesting carrier makes complete sense. In order to encourage additional carriers to enter the telecommunications marketplace, decisions about unbundling must focus on the perspective of the potential new market entrant. Although competition may benefit ILECs in the long term, it is in the short-term interest of the ILEC to preserve its market share by discouraging market entry rather than increasing efficiency, lowering prices, or providing new and innovative services. Accordingly, any consideration of the effect of unbundling on the ILEC would be inherently inconsistent with the purpose of Section 251(d)(2) itself. Therefore, the Act does not permit the Commission to address

[109] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

specifically "the financial impact created by changes to UNE availability to all affected carriers and access providers"[110] when applying the impair standard.

1. The Commission cannot apply the impair standard based solely upon a count of facilities.

For years now, the ILECs have been trying to convince the Commission to perform an impair analysis with respect to a certain network element (*e.g.*, switching) simply by counting those functionalities within a defined geographic area. This is exactly the type of impair analysis that Section 251(d)(2) does not permit, because the mere quantity of a functionality demonstrates nothing about whether requesting carriers are impaired without nondiscriminatory access on an unbundled basis to that network element. Rather than simply counting network elements owned by competitive carriers, the Commission must determine whether requesting carriers can obtain access to those network elements on a wholesale basis (*i.e.*, are the installed network elements available at wholesale rates), or whether requesting carriers can self-provision without impairment.

The ILECs allege that, where other competitive carriers have installed a particular network element, the Commission can infer that requesting carriers are not impaired when they self-provision the network element. As the plain language of Section 251(d)(2) makes clear, "impair" does not mean "impossible," or even "necessary."[111] Consequently, the fact that some competitive carriers have installed their own network elements (*e.g.*, switches) does not demonstrate that requesting carriers are not impaired because they can self-provision that network element. Rather, the Commission must determine whether requesting carriers, including

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110 *Notice*, 16 FCC Rcd at 22818, ¶ 82.

111 47 U.S.C. § 251(d)(2).

those who have yet to enter the market, may feasibly self-provision the element based, among other things, on cost of the network element, profitability, and capital markets. Should the Commission look to the business experiences of other competitive carriers who have self-provisioned the particular network element to determine whether requesting carriers would be impaired if they were forced to self-provision, it must look at those experiences in their entirety, including whether such carriers were able to implement their business plan successfully through self-provisioning.

The dangers of relying on simple counts of deployed switches and other network elements become immediately apparent upon a more thorough examination. For example, few, if any, of the switches that Verizon identified in its *ex parte* from late last year are available on a wholesale basis to competitive carriers, and many of the carriers who originally installed these switches are either bankrupt, out of the market, or in a precarious financial situation.[112] Nevertheless, Verizon claimed then, and undoubtedly will claim now, that requesting carriers are not impaired with respect to switching based on a simple count of non-incumbent switches in particular geographic areas.

Similarly, it is inappropriate to rely on LERG data to compile a switch count as some parties urge the Commission.[113] It is presumably for this reason that the Commission seeks comment in the *Notice* on "the precise nature of the LERG data" and "whether some facilities designated by the LERG as switches may not be suitable for providing local exchange service to mass market customers, and whether the methodology used by the LERG could lead to over- or

[112] *See* Letter from Thomas J. Tauke and Michael E. Glover, Verizon, to Michael Powell, Chairman, FCC, CC Docket No. 96-98. (Oct. 19, 2001).

[113] *Notice*, 16 FCC Rcd at 22807, ¶ 57.

under-counting of switches."[114] LERG data are no indication whatsoever as to availability of wholesale capacity, or even the ability to self-provision. The criteria listed in the LERG relate to network routing, and thus may not indicate the type of facility deployed, or the type of traffic routed through the equipment. Indeed, the LERG contains references to everything from 5E switches to simple routers that cannot be used to provide voice services. Accordingly, the Commission cannot determine the type of information that it needs to apply the impair standard from LERG data.

The Commission should focus on the existence of a viable wholesale market as key evidence in deciding whether a UNE should be on the mandatory list. Although the Commission in the *UNE Remand Order* rejected the argument that a wholesale market must exist before a new entrant would not satisfy the impair standard,[115] it did so based upon the misapprehension that the existence of a wholesale market is unrelated to the feasibility of self-provisioning a particular functionality. In fact, the existence of a wholesale market is the best evidence that a functionality can be feasibly self-provisioned. If self-provisioning is feasible, then new entrants will implement that approach rather than continuing to place themselves at the mercy of ILEC misconduct by relying upon UNEs. When multiple entrants begin to self-provision, they inevitably will have excess capacity, particularly early on. Their business self-interest will dictate that they make such excess capacity available to third parties at commercial rates, thereby establishing a functioning wholesale market. As a result, the existence of a functioning wholesale market is a reliable proxy for the feasibility of self-provisioning, and

114 *Id.*.

115 *UNE Remand Order*, 15 FCC Rcd at 3732, ¶ 67.

conversely the absence of such a market is *prima facie* evidence that self-provisioning is not yet feasible for a particular functionality.

Moreover, the Commission would be rewarding ILECs for their refusal to comply with statutory obligations were it to engage in a count-the-functionalities approach to applying the impair standard. Where the ILECs refused to comply with the unbundling requirements, competitive carriers were forced to incur the risk of installing their own network elements despite impairment. Many of these carriers have since filed for bankruptcy or otherwise ceased operations. The fact that competitive carriers were forced by ILEC misconduct into adopting risky self-provisioning strategies cannot reasonably be regarded as support for the assertion that self-provisioning is feasible.

2. The Commission should not consider the availability of tariffed offerings when applying the impair standard.

In the *Notice*, the Commission asks whether the availability of tariffed offerings should play a role in the Commission's unbundling analysis.[116] Both times that the Commission has addressed this issue it has concluded that the availability of tariffed offerings should play little role in its unbundling analysis. As the Commission explained in the *UNE Remand Order*,

> allowing incumbent LECs to deny access to unbundled elements solely, or primarily, on the grounds that the element is equivalent to a service available at resale would lead to impractical results; incumbent LECs could completely avoid [S]ection 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services. In other words, denying access to unbundled elements on the grounds that an incumbent LEC offers an equivalent retail service could force requesting carriers to purchase, for example, an unbundled loop and switching out of a

116 *Notice*, 16 FCC Rcd at 22801, ¶ 44.

> an incumbent's retail tariff at a wholesale discount, subject to all of the associated tariff restrictions.[117]

CompTel agrees entirely with the Commission's earlier conclusion, and the Commission should reiterate that the availability of tariffed offerings can play no role in its application of the impair standard.

3. The Commission must consider the state of the capital markets when applying the impair standard.

CompTel strongly agrees with the Commission's stated intent to take into account evidence of actual marketplace conditions in determining whether competitive carriers are impaired without access to UNEs.[118] As discussed above, Section 251(d)(2) requires the Commission to apply the impair standard from the perspective of the requesting carrier. Access to capital is critical to the ability of requesting carriers to provide the services they seek to offer, particularly considering the fact that telecommunications is a capital intensive business. Therefore, the Commission must consider the state of the capital markets as part of its impair analysis. In this case, CompTel submits that based on the current state of capital markets in the United States, self-provisioning of any UNE is inherently infeasible for a brand-new entrant and for many existing entrants. As a result, the Commission cannot lawfully consider self-provisioning as an option for requesting carriers when applying the impair standard.

The current state of capital markets in the telecommunications market is abysmal. In less than five years, the competitive carrier industry has experienced a rapid reversal of fortune on Wall Street, with capital markets virtually drying up and many banks and venture

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117 *UNE Remand Order*, 15 FCC Rcd at 3732, ¶ 67.

118 *Notice*, 16 FCC Rcd at 22789, ¶ 17.

capital firms no longer lending money to, or financing deals with, competitive carriers.[119] The result of this recent downturn in the financial market is that competitive carriers are unable to fund network expansion, or to continue operating existing facilities. In cases where an entity seeks to enter the telecommunications market for the first time, it is all but impossible to obtain the financing necessary to pursue an approach based wholly or even partially upon self-provisioning.

Examples of the increased financial vulnerability of carriers due to the scarcity of capital abound in the past year.[120] In many cases, competitive carriers have declared bankruptcy, either in an attempt to reorganize under severely revamped business plans or to liquidate assets altogether.[121] The downgrading of an entrant's stock rating often leads to an inability to utilize other funding options such as private equity and vendor financing,[122] which in turn frequently leads to missed critical payments on existing bank notes and a further downgrading of company

119 Richard Siderman, "The Dramatic Rise (and Fall) of CLECs in the U.S.," Standard & Poors, at http://www.standardpoor.com/Forum/RatingsCommentaries/CorporateFinance/Articles/112001.clecs.html (Nov. 13, 2001). *See also* Tim Kraskey, "We Had a Great Run, Get Over It!" editorial published at www.broadbandpub.com/broadbandworld/v3n2/run.pdf, (last visited on April 4, 2002).

120 Ralph Derrickson, interim chief executive officer of Metricom, Inc. blamed the "depressed state of the capital markets" for the wireless data service provider's inability to secure financing, leading to its filing for Chapter 11 bankruptcy protection last year. "Unable to Find New Funding, Metricom Files for Bankruptcy," Telecommunications Reports, Vol. 67, No. 27, July 9, 2001.

121 "Digital Broadband files for Chapter 11," CLEC.com News (Dec. 28, 2000) at http://www.clec.com/newsprint.asp?ContentID=2147427623 ("[Digital Broadband Communications] said that after the recent downturn in the financial markets, it was not able to attract enough financing to continue growing.").

122 "Fitch downgrades rating of Rhythms' senior notes," CLEC.com News (Mar. 28, 2001) at http://www.clec.com/newsprint.asp?ContentID=2147436109.

stock, illustrating the vicious cycle in which many competitive carriers have operated, and in some cases, continue to operate today.[123]

In Salomon Smith Barney's Telecommunications Services Industry Overview, published January 14, 2002, analysts remain "less constructive" on competitive carriers due to their funding status and high debt levels:

> "As capital markets shut down to these players and business growth continues to slow from the meltdown of the economy and Internet boom, it is becoming increasingly difficult to see how these companies will be able to support their current debt levels."[124]

The analysts' negative reports and the high-profile failures detailed in the press have also made it increasingly difficult for surviving competitive carriers to sell their services in the marketplace, with more customers putting competitive carriers under more scrutiny before entering into contracts for service.[125]

The post-September 11 economy has made a difficult environment for competitive carrier stocks even more dire,[126] resulting in an increase of corporate bond defaults and strict standards and requirements imposed by lenders that must be met in order to obtain

[123] Denise Culver, *et al.*, "CLECs Weather Newest Threat: Themselves," The Net Economy (Jan. 21, 2002) at http://www.theneteconomy.com.

[124] B. Grubman, S. McMahon and C. Gochuico, "Telecommunications Services Industry Overview: Positive Trends for Many Long-Haul Players," Jan. 14, 2002.

[125] G. Waldorf and R. Hopper, "How to Win CLEC Jeopardy – A Cautious, Credit-Oriented Approach," UBS Warburg Global Equity Research, July 24, 2001 at pg. 13. ("UBS Warburg Analysis").

[126] Thomas C. Morabito of McDonald Investments, Inc., in downgrading the stocks of Allegiance, McLeodUSA and Choice One Communications, noted, "[w]e believe that the very best investors can expect is for the CLECs to minimally meet expectations that in many cases were already downwardly revised." T. Leithauser, "CLEC Stalwarts Stumble in New Economic Climate; McLeodUSA Denies It Is Considering Bankruptcy," Telecommunications Reports, Vol. 67, No. 39, Oct. 1, 2001.

further financing.[127] Banks, in particular, are requiring strict adherence to covenants, allowing very little flexibility, and are ultimately more invasive in the business of the companies to which they have extended financing.[128] "[R]ecent business failures in the telecom industry, which have left lenders with 'little or nothing,'" have dramatically shrunk the capital markets for competitive carriers and placed stringent requirements on any new financing.[129]

A November 2001 filing by Net2000 Communications Inc. with the Securities and Exchange Commission, described how poor financial performance led to its lenders' decision to cut funding, which eventually resulted in the company's Chapter 11 bankruptcy filing:

> "Although we have not received notice of default from our lenders, they have informed us that we can no longer draw funds under the facility … As a result, we are no longer able to fund our operations … We have attempted to seek other sources of capital as well as to work with lenders … At this time, however, we are unsuccessful in raising additional capital … Accordingly, the company will seek the protection of bankruptcy."[130]

The current recession has shut cash-hungry competitive carriers out of capital markets, which has led to layoffs, restructuring and bankruptcies as the carriers have run out of cash to continue operations.[131]

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127 *See e.g.*, "Telecom Sector is Leader In Corporate Bond Defaults," Telecommunications Reports, Vol. 67, No. 33, Aug. 20, 2001; "Banks Threaten to Declare Williams in Default on Loans," Telecommunications Reports, Vol. 68, No. 6, Feb. 11, 2002.

128 "Banks Threaten to Declare Williams in Default," *supra*, (discussing lenders' new attitudes with Frank J. Governali, an analyst with Goldman, Sachs & Co).

129 *Id.*

130 "Net2000 Files for Bankruptcy amid Funding Cuts," Telecommunications Reports, Vol. 67, No. 46, Nov. 19, 2001 (citing a Nov. 11, 2001 filing by Net2000 with the Securities and Exchange Commission).

131 B. Bracken, "Temperamental Journey," Business and Finance, March 2001.

The events affecting McLeodUSA, Inc. since last fall are illustrative of the financial situation facing many competitive carriers. Revenue projections in October 2001 called for the company to generate $1.8 billion in revenues for 2001, with EBITDA of only $130 million, excluding charges.[132] Predictions for this year look no better, with only $1.8 billion in revenues forecast for 2002 – a far cry from the $2.3 billion predicted by McLeodUSA in August 2001.[133] In response, McLeodUSA scrapped its plans for a national expansion and began selling assets in an attempt to cut costs through facility closures and trimming of capital expenditures.[134] On January 31, 2002, McLeodUSA filed for Chapter 11 bankruptcy protection.[135]

The number of bankruptcies afflicting the competitive carrier industry is a tragic illustration of how capital markets that were once amenable to the telecom industry have now dried up. The attached "Viability Analysis Chart" demonstrates the number of competitive carriers that have either filed for bankruptcy or are on the brink of doing so.[136] Perhaps even more astounding is the hundreds of millions of dollars of value that has been destroyed through the drop in stock prices of these competitive carriers.[137] The scarcity of available capital makes it extraordinarily difficult, if not impossible, for competing carriers to obtain capital from third parties to purchase new facilities or operate existing ones. Furthermore, most investors are not

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132 "McLeodUSA Drops Ambitions To Become Nationwide CLEC," Telecommunications Reports, Vol. 67, No. 40, Oct. 8, 2001.

133 *Id.*

134 *Id.*

135 "McLeodUSA Files Chapter 11", The Street.com (Jan. 31, 2002) at http://www.thestreet.com/markets/marketfeatures/10007790.html.

136 CompTel Viability Analysis Chart at Attachment B.

137 *Id.*

willing to ante up more money to replace capital already "burned" to cover operating losses or lost in bankruptcy.[138]

Even companies that have not sought bankruptcy protection are burdened by enormous interest payments on debts incurred to build out vast networks, and most competitive carriers will need to continue to incur additional debt until these large networks begin to generate positive cash flow.[139] The cost of building these networks is immense. From 1997 to 1999, the top 10 independent competitive carriers spent $1 billion on capital expenditures.[140] Competitive carriers' profits are further eroded by sales and marketing expenditures necessary to promote and market their services without an established brand name.[141] The debt that competitive carriers have incurred to build networks has led to a reluctance by the investment community to deploy capital necessary to expand networks or even operate existing facilities.[142] Former Commission Chairman William E. Kennard stated that there is "no problem with the business model for

138 W. D. Fore and A. Chan, "Competitive Telecom – The CLEC Sector: Quarterly Update," Bear Stearns Equity Research, December 2001.

139 "CLEC Meltdown Seems Worse As Layoffs, Cutbacks Continue," Telecommunications Reports, Vol. 67, No. 14, Apr. 9, 2001 (discussing Winstar Communications, Inc.'s cumulative problems of low revenues, low profit margins, enormous interest payments and negative cash flow.)

140 Rob Fisher, "Rescuing the CLECs," ComNews.com (June 2001) at http://www.comnews.com/stories/articles/c0601guest.htm.

141 *Id.*

142 *See, e.g.*, "Tough Times but No Change in Underlying Need," Broadband Wireless Online, Vol. 2, No. 06, June/July 2001, at http://www.shorecliffcommunications.com/magazine/volume.asp?Vol=16&Story=153; J. Bounds, "Baby Bell Rivals Lose Luster After Fast Start," Dallas Business Journal (Sep. 22, 2000) at http://dallas.bizjournals.com/dallas/stories/2000/09/25/story7.html; Lori Allen, "Point of No Return?", tele.com (Nov. 27, 2000) at http://www.teledotcom.com/article/TEL20001127S0006.

[competitive carriers], rather, the problem is that Wall Street ran out of patience in funding network build-outs."[143]

In sum, the Commission must take into account the current state of capital markets when applying the impair standard. At the present time, this factor shows that self-provisioning is not a feasible option for any functionalities, and therefore the Commission is precluded from considering self-provisioning as an option when conducting the impair analysis.

4. The Commission must consider profitability in determining whether a competitive carrier can self-provision.

Assuming *arguendo* that the Commission continues to consider self-provisioning when conducting the impair inquiry, the Commission cannot consider the existence of self-provided functionalities in the marketplace today as evidence of the feasibility of self-provisioning without taking into account whether the entrants engaging in self-provisioning have done so with a sufficient level of profitability to sustain entry over time. In the *Notice*, the Commission stated that it analyzes costs but not profitability when applying the impair standard.[144] While that approach may make sense when comparing functionalities obtained from ILECs versus functionalities obtained from other third parties, such an approach is an impermissible application of the impair standard when self-provisioning is under consideration. In particular, should the Commission examine past examples of self-provisioned functionalities as potential evidence that self-provisioning is feasible, the Commission must determine whether such activities were undertaken profitably. If not, the existence of past experiments in self-

[143] "CLECs Urged to Keep Eye on Policy Issues: Structural Separation Movement Seen Growing," Telecommunications Reports, Vol. 67, No. 9, Mar. 5, 2001, citing keynote remarks made by former FCC Chairman William E. Kennard at the Feb. 28, 2001 Competitive Carrier Regulatory Summit in Washington, D.C.

[144] *Notice*, 16 FCC Rcd at 22786, ¶ 8, n.23.

provisioning that failed to produce a viable business operation does not justify the removal or paring back of the UNE list, particularly given the dramatic changes in capital markets over the past several years.

Many carriers can self-provision network elements (or at least could before the capital markets closed), but that does not show that they are not impaired without access to UNEs. Any new entrant can self-supply almost any UNE – whether it is switching, loops, or another functionality – in order to provide telecommunications services if no regard is given to making a profit, attracting capital or staying in business. However, the statutory impair inquiry is designed not merely to determine whether it is technically possible for an entrant to self-provision a functionality, but rather to determine whether the requesting carrier lacks "the ability" to offer its desired services without access to the functionality as an ILEC-supplied UNE.[145] It is meaningless to conduct the impair inquiry in this context without assessing whether the entrant can self-supply a functionality while sustaining cash flow-positive operations. Particularly given the industry's experiences over the last two years – where numerous carriers that have tried to self-provision one or more functionalities have declared bankruptcy or otherwise exited the market – it would be unreasonable for the Commission to assume that an entrant today has the "ability" to provide its desired services through self-provisioning just because one or more carriers unsuccessfully attempted something similar a few months or years ago.

It would be particularly unreasonable for the Commission to ignore whether self-provisioning can be implemented profitably because many previous efforts by new entrants to

[145] 47 U.S.C. §251(d)(2).

engage in self-provisioning were necessitated by the failure of the ILECs to provide UNEs as required by the statute and the Commission's rules, compounded by the Commission's failure to enforce the statute and its rules. As such, past attempts to self-provision functionalities should be regarded as a type of marketplace experiment, and such experiments cannot be regarded as evidence of the feasibility of self-provisioning without examining and understanding whether the experiments were successful.

The current state of the competitive industry underscores the need for this approach to the impair inquiry. There has been a large number of bankruptcies since August 2000, and the list gets longer each month.[146] As one commentator has noted, "[t]he reality is that almost no competitive carriers are profitable and most are saddled with massive debt."[147] In this environment, it is clear that many entities have pursued a variety of business plans that have not succeeded in the marketplace. While the facilities that such entities purchased or built may still remain in the industry, that fact, in and of itself, cannot be regarded as evidence that new entrants have the "ability" to provide the services that they seek to offer through self-provisioning.

5. The Commission must consider the amount of disruption that would occur if a UNE is removed from the national list in applying the impair standard.

The Commission seeks comment on whether and to what extent it should "specifically address the financial impact created by changes to UNE availability to all affected carriers and access providers."[148] The Commission also seeks comment on whether it should

[146] New Paradigm Resources reports that twenty nine competitive carriers filed for bankruptcy between August 2000 and August 2001. *CLEC Report 2002*, 15th ed. 2002.

[147] M. Martin, "Besieged CLECs Continue to Flounder," Network World, May 7, 2001, published at http://www.itworld.com/Net/2623/NWW010507120399, visited on Feb. 25, 2002, quoting Jeff Moore, an analyst with Current Analysis.

[148] *Notice*, 16 FCC Rcd at 22818, ¶ 82.

"address the financial impact of changes to UNE availability in a similar manner for all affected carriers, or whether the Commission can and should target its concerns to facilities-based providers or other classes of carriers."[149]

To the extent that competitive carriers are now using a UNE, the Commission should consider when applying the impair standard the burden and disruption that removing or restricting a UNE would cause, particularly in today's difficult economic conditions. For example, if the Commission were to remove a network element from the mandatory UNE list and the price for that network element increased significantly (even if that increase occurs only in limited areas), the immediate reduction in gross margin for many competitive carriers would result in diminished levels of working capital and cash flow available for fixed charges, thereby causing them to violate their financial covenants under credit facilities and to face possible acceleration of all amounts outstanding thereunder. Even if these carriers were able to renegotiate the terms of their credit facilities based on the resulting changes in economic conditions in the UNE market, they would incur substantial workout or similar costs and expenses and would, in any event, be subject to an increased cost of credit given their lower margins and greater overall risk profile. Accordingly, these carriers might not be able to secure the additional debt or equity financing needed for current operations and/or projected growth (particularly given the current state of the financial markets), potentially leaving bankruptcy or insolvency relief as the only viable course of action for many in this position. In sum, the removal of a network element from the mandatory UNE list could trigger a chain reaction that would force many viable carriers into bankruptcy or insolvency.

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[149] *Id.*

Apart from the potential effect that removal of a UNE could have on the financing of competitive carriers, removal of a UNE could severely harm the many competitive carriers that have invested large sums of capital in reliance on the existence of certain UNEs – marketing, customer bases, back-office systems. As such, separate and apart from potential harm to new entrants, removal of that network element from the UNE list could cause irreparable and widespread harm to existing entrants.

In light of the serious effects that removal of a network element from the UNE list can cause, the Commission must consider this factor when applying the impair standard. In the event that the Commission does rule that a network element should be removed from the mandatory UNE list, the Commission should "grandfather" all pre-existing uses and users of that UNE.

C. Granular Application of the Impair Standard Would Be Too Administratively Burdensome.

In the *Notice*, the Commission asks for comment on how to weigh the benefits of more refined unbundling rules against the administrative burden of conducting the more detailed analysis and applying more complicated rules.[150] As explained above, CompTel urges the Commission to apply the impair standard in a thorough manner, not in the type of "granular" manner discussed in the *Notice*.

Even if the Commission wanted to perform a more granular impair analysis, it simply does not have the resources to do so. Application of the impair standard on a service-by-service basis, considering the customer type, requesting carrier type, facility and capacity type for each relevant geographic area for each service, would be overwhelming. Indeed, it would not

[150] *Notice*, 16 FCC Rcd at 22800, ¶ 40.

be possible for the Commission to apply the impair standard in this manner even if the Commission had sufficient resources because the rapidly changing telecommunications marketplace would always stay several steps ahead of the Commission. The Commission would only harm competition by attempting to apply an impossible standard, which would lead to imperfect results and endless litigation and appeals. The costs of entry would skyrocket, and carriers would be delayed in entering the local market.

D. The Commission Cannot Remove UNEs or Impose Restrictions on UNEs Based on Putative Concerns About Universal Service or Access Charges.

The Commission seeks comment on whether there are other goals that the Commission should take into account in its unbundling analysis.[151] There is no empirical or policy basis for the Commission to remove UNEs or to adopt UNE restrictions to address putative concerns about universal service or interstate access charges. There are no implicit universal service subsidies in the ILECs' special access charges.[152] Further, the FCC has removed all implicit subsidies that it believes may exist in the ILECs' interstate switched charges.[153] In light of the explicit statutory directive in Section 254(e) that all universal service subsidies must be "explicit," there is no lawful basis for adopting interim or permanent rules that

151 *Id.* at 22796, ¶ 31.

152 *E.g., Access Charge Reform*, 12 FCC Rcd 15982, 16155, ¶ 404 (1997); *UNE Remand Order*, 15 FCC Rcd at 3915, ¶496 n.994 (1999); *see also* Comments of CompTel, filed Jan. 19, 2000, CC Docket No. 96-98, at 5-6 (quoting ILEC filings stating that special access rates are cost-based).

153 *Access Charge Reform*, 15 FCC Rcd 12962 (2000) (price-cap regulated ILECs); *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 11244 (2001) (rate-of-return regulated ILECs).

maintain implicit subsidies in interstate access charges or modify the statutory UNE regime to protect any such implicit subsidies as may continue to exist.[154]

Further, the ILECs' desire to impose above-TELRIC rates on new entrants cannot support the removal of UNEs or any UNE restrictions. The ILECs' desire to recover so-called "overheads" is a back-door challenge to the statutorily-required TELRIC pricing standard. The FCC has already held that TELRIC pricing fully compensates the ILECs for the cost of providing UNEs,[155] and there is no basis in fact or policy to adopt any UNE restrictions in order to permit ILECs to recover above-TELRIC rates. Rather, any such ruling would violate the statutory pricing standard in Section 252(d)(1), as interpreted and applied by the FCC itself in repeated decisions.

E. The ILECs Must Modify their Networks in Order To Provide Access to Unbundled Network Elements.

The Commission seeks comment on "the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements as required under rules prescribed by the Commission," and if "these policies be limited to interoffice transmission facilities, or are they equally applicable to loops and other network elements."[156] CompTel urges the Commission to rule that its current policies apply equally to all UNEs, and are not limited only to interoffice transmission facilities. Unless ILECs are required

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154 47 U.S.C. §254(e). In the event that the FCC desired to adopt a timetable for establishing "explicit" universal service subsidies, Section 254(a) required the FCC to have acted by May, 1997. Hence, there is no lawful basis upon which the Commission adopt rules to preserve or phase-down any implicit subsidies that it might believe may still exist in interstate access charges. For the record, CompTel wishes to affirm its view that no such subsidies exist in interstate access charges, although they remain above cost to this day.

155 *Local Competition Order*, 11 FCC Rcd at 15864, ¶ 721.

156 *Notice*, 16 FCC Rcd at 22811, ¶ 65.

to modify their networks in order to facilitate implementation of the Commission's UNE rules, those rules ultimately will not be effective, which would undermine the goals that the UNE requirements are designed to achieve.

The Commission also seeks comment on the "extent of incumbent LECs' obligations to take reasonable steps to comply with their unbundling obligations," and invites "proposals for guidelines or bright line rules that would provide sufficient guidance to all parties involved to minimize disputes arising from implementation of unbundling requirements adopted in this proceeding."[157] Under the Act, the ILECs have a duty to take reasonable steps to comply with their unbundling obligations, just as all carriers must take reasonable steps to comply with Commission rules that implement the Act. CompTel encourages the Commission to impose affirmative duties on ILECs insofar as it will help them to comply with their obligations under the Act. Although ILECs may not need to engage in new construction of network facilities, the Commission should require them to undertake affirmative obligations so that the Act works as Congress intended.

F. The Commission Should Adopt UNE Policies that Promote the Public Interest in Ensuring that Our Nation's Telecommunications Networks Are Protected Against Terrorist Activities.

The Commission seeks comment on industry "experience relating increased investment in the nation's telecommunications infrastructure with increased redundancy and reliability necessary to ensure the continuous delivery of all services to the public."[158] The collective experiences of CompTel's members following the terrorist attacks on September 11,

157 *Id.*

158 *Notice*, 16 FCC Rcd at 22794, ¶ 25.

2001 demonstrate a compelling need for the Commission to ensure maximum protection against future terrorist attacks by fostering competition through the broad availability of UNEs to new entrants.

CompTel believes that national security requires the Commission to adopt policies, consistent with the Communications Act of 1934, to promote alternative infrastructure investment by non-incumbent carriers. In order to limit the scope and duration of any outages caused by future attacks, there should be multiple facilities-based networks built, owned and operated by carriers other than the ILECs. By promoting non-incumbent investment, the Commission can maximize the efficient development of the type of network infrastructure necessary to minimize the impact of terrorist attacks upon the United States. The question the Commission must ask is what policies will assist non-incumbent carriers in developing alternative facilities and networks. As the premier industry association representing non-incumbent carriers, CompTel feels qualified to answer that question, on behalf of its members, by urging the Commission to provide new entrants with the greatest opportunity to develop facilities-based networks by allowing them an opportunity to develop a market base through the widespread availability of all network elements without any restrictions, carve-outs, or limitations.

In adopting policies to limit our nation's vulnerability to terrorism, the Commission should recognize that non-incumbent carriers have natural incentives to minimize their reliance upon the ILECs' monopoly networks. The hard lesson learned by the industry over the past several years is that those business plans which depend least upon ILEC networks and cooperation are the least vulnerable to disruptions caused by unchecked ILEC misconduct. As a result, all competitive LECs have a strong incentive to migrate away from ILEC capabilities as soon as it makes economic and technical sense to do so. Competitive LECs desire access to UNEs only because it is a necessary first step in the development of facilities-based alternatives. Particularly in this day of tight capital markets, new entrants cannot reasonably expect to receive funding to build out an extensive facilities-based network from scratch at the outset. The ready availability of UNEs – which unfortunately does not exist today under the FCC's current policies – plays a critical role in the development of alternative infrastructure by new entrants.

It should be noted that the development of competitive alternatives over the past five years played a major role in helping our nation cope with and recover quickly from the terrorist attacks of September 11. Competitive carriers were critical to ensuring that the massive volume of wireline and wireless calls within the United States as well as to overseas locations were connected during the September 11 tragedies and their immediate aftermath. CompTel member companies contributed assets without charge (*e.g.*, fiber optic capacity; switching capacity; servers; generators; wireless telephones; prepaid calling cards) and found ways to complete millions of calls at a reduced level of profitability or even at a loss.[159] Restoration efforts would have taken much longer without the direct assistance of CompTel member companies, including AT&T and WorldCom. What is important to stress is not just that these efforts were made, but that these companies were in a position to participate in this effort due to the success of the market-opening provisions of the Telecommunications Act of 1996. Ensuring a vibrant competitive industry through a robust UNE regime should be a key aspect of any future planning on public telecommunications network security in the United States.

[159] *See* Letter to President Bush from R. Frisby, CompTel (Oct. 3, 2001) (Attachment C).

Investment by non-incumbent carriers is especially important because these entities have the incentive to aggressively explore and implement "disruptive" technologies. While these technologies are unattractive to ILECs because they tend to render embedded plant less valuable or even obsolete, they have the significant advantage of making our public networks less vulnerable to attack. One example is the deployment of soft switch technology. While the ILECs have largely ignored this development, competitive carriers are actively seeking to integrate this technology into their networks. One of the benefits of soft switch technology is that it mitigates and disperses the choke points in the network. Should any node go down for any reason, this technology helps to ensure that the maximum number of customers, including many of those previously served directly by the affected node, can continue to receive uninterrupted service. This technology has obvious implications for public telecommunications network security, and the only way to ensure the implementation of this technology is to establish incentives for further investment by non-incumbent carriers.

By contrast, future ILEC investment will not make our nation less vulnerable to terrorist attacks. Unlike competing carriers, the ILECs have no natural incentives to maximize the development of alternative networks or to deploy "disruptive" technologies, such as DSL or soft switches, which minimize the value of embedded plant. The ILECs' current networks are designed with multiple choke points that increase our vulnerability to terrorist attacks. If past is prologue, future investment by the ILECs is almost certain to be incremental in nature as a means of providing maximum returns on existing investments according to a relatively short timescale.[160] The ILECs have resisted rather than embraced the "disruptive" technologies which

[160] *See* Broadband: Bringing Home the Bits, Computer Science and Telecommunications Board, National Research Council at S-7 (Prepublication Copy 2001).

could reduce the revenue streams from their embedded infrastructure. Further, the types of innovative technologies and applications that are needed to reduce our vulnerability to terrorist attacks are unlikely to be subject to control by a single industry player. Because the ILECs historically have refused to invest in technology or applications that they cannot control, the ILECs are poor candidates for the type of investment that this country needs to enhance the security of its telecommunications networks. In sum, future ILEC investment is unlikely to result in any meaningful reduction in our nation's vulnerability to future terrorist attacks, and therefore the Commission should implement the statute through policies designed to promote non-incumbent investment.

In adopting policies to promote investment in alternative facilities by non-incumbent carriers, the FCC has to ask itself whether it should listen to the entities on whom the nation is relying to make those investments, or the incumbent monopolists who stand to lose market share and revenues if such investments are made. The answer should be obvious. Competitive entrants need a strong UNE regime without regulatory restrictions in order to develop alternative network facilities, and the FCC will increase our nation's vulnerability to terrorist actions if it grants ILEC requests to remove or pare back the list of mandatory UNEs. It must be emphasized that the process of developing alternative capabilities will not happen overnight, as new entrants initially will require significant interaction with the ILECs' networks and facilities. However, if the Commission remains vigilant in enforcing the statute as written, such dependence will decline over time as new entrants distance themselves from ILEC misconduct by building out their own facilities and capabilities. Ultimately, competition will deliver alternative networks that utilize the most efficient technologies to minimize our vulnerability to future terrorist attacks.

G. The Commission Should Not Adopt Temporal Restrictions on UNEs.

The Commission seeks comment on "whether, consistent with the statute, we can or should impose absolute temporal boundaries on UNE availability, including approaches in which the requirements that incumbents unbundle specific network elements would sunset as of a date certain."[161] Specifically, the Commission seeks comment "in particular on whether a sunset period for remaining unbundling obligations could create incentives for facilities deployment and investment."[162] The Commission also seeks comment on "other, non-temporal triggers that might signal that requesting carriers no longer need access to particular UNEs."[163]

CompTel strongly opposes any UNE "triggers" and "sunsets." Under Section 251(d)(2), the Commission cannot remove a UNE from the mandatory list unless it finds based on record evidence that the impair test is not satisfied. However, the Commission does not have any empirical basis for predicting years in advance when a particular functionality will no longer satisfy the impair standard. Especially if the FCC implements a granular approach to the impair standard, with variations based on geography and possibly other factors, it would be impossible for the FCC to offer data-backed predictions with any degree of reliability. Rather, it would be sheer guesswork, or the improper exercise of back-door forbearance authority contrary to Section 10(d), for the FCC to eliminate UNE obligations in this fashion. New entrants are entitled by law to have access to network elements that satisfy the impair standard, and the Commission does not have authority, through the adoption of triggers, sunsets or other arbitrary criteria, to deny such access. The Commission has already established a list of mandatory UNEs based on

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161 *Notice*, 16 FCC Rcd at 22802, ¶ 45.

162 *Id.* at 22818, ¶ 80.

163 *Id.* at 22802, ¶ 46.

record evidence, and it should narrow or pare that list only if the ILECs can present sufficient evidence to demonstrate that a rule change is warranted.

The Commission appears to be targeting the UNE Platform as a candidate for being phased out through triggers or sunsets. In particular, the Commission asks whether a requesting carrier utilizing the UNE Platform should be "required to migrate customers to its own facilities once it begins providing service to a sufficient number of customers served by a single central office."[164] There is no empirical basis to believe that there is a "magic number" of customers after which it will always be feasible in every ILEC's region in every state for a UNE-P carrier to migrate subscribers to its own facilities. Rather, the point at which it makes sense to consider implementing self-provisioning could vary significantly from one carrier to another, often based on factors that are unique to each carrier. Further, many factors – such as, for example, average traffic volume per customer, the availability and cost of collocation arrangements, and the cost of self-provisioning – can be expected to vary over time in ways that the FCC cannot reliably predict today. The FCC should not seek to become a fortune-teller peering into a cloudy crystal ball, but should focus on making sure that new entrants have access to the UNEs they need in order to sustain competitive entry against the ILECs.

Lastly, the mere existence of "triggers" and "sunsets" has a significant adverse impact on the ability of new entrants to attract capital from Wall Street and other sources. Potential investors will naturally be less likely to invest the sums necessary to fund competitive telecommunications ventures if they perceive the regulatory regime necessary for such ventures to succeed is unstable or likely to be significantly changed over a three-year or other short-term

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164 *Id.*

investing time span. Uncertainty undermines the confidence investors require in order to invest in new entry into this market segment, particularly given the market downturn of recent times. The adoption of triggers, sunsets or similar mechanism maximizes the uncertainty that is harmful to the development of competitive alternatives in this industry.

IV. THE ILECs HAVE NOT PRESENTED ANY FACTS TO SUPPORT A FINDING THAT SPECIFIC UNES NO LONGER MEET THE STATUTORY STANDARD

A. The Triennial Review Is Not a Reconsideration Proceeding.

The Commission seeks comment on the burden of proof that a party seeking to modify current rules and policies should bear.[165] As a matter of law, the ILECs must have the burden of proof to modify or remove an existing Commission rule. Because the current UNEs are established by rule, the party seeking to modify or eliminate a rule or policy, as a matter of law, bears the burden of justifying the proposed changes.[166]

Further, the Commission should not, and indeed cannot, treat this as a reconsideration proceeding. The deadline for filing petitions for reconsideration of the impair standard expired on February 17, 2000. With respect to petitions for reconsideration of the *UNE Remand Order*, which were timely filed by CompTel and other parties, CompTel urges the Commission to resolve all of those petitions promptly.

165 *Id.* at 22817-18, ¶ 77.

166 *See, e.g., Commonwealth of P.R. v. Federal Mar. Comm'n*, 468 F.2d 872, 881 (D.C. Cir. 1972) (discussing the "policy of requiring a person seeking a change from the status quo to take on the burden of justifying the change").